IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

03-3426SIDM
CRIMINAL

UNITED STATES OF AMERICA,

Appellant,

v.

JASON NEAL LIGHTHALL,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA
HONORABLE RONALD E. LONGSTAFF, CHIEF JUDGE

BRIEF OF APPELLANT

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

This is an appeal in a criminal case against Defendant Jason Neal Lighthall in which the district court decided to depart downward 20 months from the applicable sentencing guideline range of 70-87 months imprisonment to a sentence of 50 months. Lighthall was convicted of the crime of distribution of child pornography and of the crime of receipt of child pornography.

Lighthall raised several grounds for downward departure. The district court rejected all of these grounds except that of significantly reduced mental capacity, which is now a prohibited factor under the PROTECT Act (effective April 30, 2003.)

The Government appeals that decision. The United States respectfully submits that Lighthall's alleged compulsive-obsessive disorder does not legally or factually support a downward departure.

The United States believes that oral argument may be helpful to this Court, and suggests an allocation of 10 to 15 minutes of time.

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JURISDICTIONAL STATEMENT

This is an appeal for review of a sentence in a criminal case imposed on September 3, 2003, by the United States District Court for the Southern District of Iowa, the Honorable Ronald E. Longstaff, Chief Judge. The district court's jurisdiction is premised on 18 U.S.C. § 3231. On September 29, 2003, the Government filed a notice of appeal with the district court. The Government certifies that the prosecution of this appeal has been approved personally by the Solicitor General of the United States in accordance with 18 U.S.C. § 3742(b). This Court has jurisdiction over this appeal pursuant to 18 U.S.C. § 3742(b)(2), which provides that the Government may file a notice of appeal for review of an otherwise final sentence if the sentence was imposed as a result of an incorrect application of the sentencing guidelines. This Court has further jurisdiction of this appeal pursuant to 18 U.S.C. § 3742(b)(3), which provides that the Government may file a notice of appeal for review of an otherwise final sentence if the sentence is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser term of imprisonment than the minimum established in the guideline range. This Court has directed the filing of the Brief of Appellant on or before November 4, 2003.

STATEMENT OF THE ISSUES

I. The standard of review of a decision to depart from a sentencing guideline range is *de novo*.

United States v. Hutman, 339 F.3d 773 (8th Cir. 2003)
PROTECT Act of 2003, Pub. L. No. 108-21, § 401(d)(2), 117 Stat. 650 (2003)

II. The district court erred in granting a downward departure on the basis that Lighthall's alleged compulsive-obsessive disorder significantly impaired his ability to control his behavior which he knew was wrongful.

United States v. Caro, 309 F.3d 1348 (11th Cir. 2002)

United States v. Lake, 53 F. Supp. 2d 771 (D.N.J. 1999)

United States v. McBroom, 124 F.3d 533 (3rd Cir. 1997)

United States v. Saffeels, 39 F.3d 833 (8th Cir. 1994)

STATEMENT OF THE CASE

On August 14, 2002, Lighthall was charged in a five count Indictment with distribution of child pornography, in violation of 18 U.S.C. § 2252(a)(2); with possession of child pornography in connection with the distribution charge, in violation of 18 U.S.C. § 2252(a)(4)(B); with his later receipt of child pornography, in violation of 18 U.S.C. § 2252(a)(2); with possession of child pornography in connection with the receipt charge, in violation of 18 U.S.C. § 2252(a)(4)(B); and with forfeiture, as directed by 18 U.S.C. § 2253.[1]

The crime of distribution of child pornography and the crime of receipt of child pornography each carry a statutory maximum penalty of fifteen (15) years. 18 U.S.C. § 2252(b)(1). The applicable Sentencing Guideline is U.S.S.G. § 2G2.2. The crime of possession of child pornography has a statutory maximum penalty of five (5) years. 18 U.S.C. § 2252(b)(2). The applicable Sentencing Guideline is U.S.S.G. § 2G2.4. Because convictions of the possession offense are now automatically grouped with convictions for distribution and/or receipt of child pornography, U.S.S.G. § 3D1.2(d),

[1] State charges that had been filed prior to the government's prosecution were dismissed following Lighthall's Indictment by the federal grand jury.

it was decided to dismiss these counts of the Indictment in exchange for the guilty pleas.

The probation officer calculated the sentencing range as follows: The base offense level is 17, and a series of specific offense enhancements (*i.e.*, for use of a computer; for distributions that involved the receipt of a thing of value; and for materials that depicted both prepubescent children and sado-masochistic conduct) brought his adjusted offense level to 30. The defendant's offense level was reduced by three levels to account for his acceptance of responsibility. As a category I offender convicted of a level 27 offense, the defendant's guidelines range was 70-87 months' imprisonment. (PSR, ¶¶ 26-37, pp. 10-11; Sent. Tr., pp. 6-7).[2]

Although Lighthall did not dispute his guidelines range as calculated, he moved for a downward departure on the basis of (1) post-offense rehabilitation; (2) the need to continue his sex-therapy treatment program without interruption; (3) his susceptibility to abuse in prison; and (4) the presence of numerous mental disorders,

[2] References to the sentencing transcript are designated as (Sent. Tr., p.). References to the presentence report are designated as (PSR, ¶, p.). References to attachments to the presentence report are designated as (PSR, "Author "Att., p.).

including an alleged obsessive-compulsive disorder which he claimed significantly reduced his mental capacity, thereby impairing his ability to control his behavior

which he otherwise knew to be wrong.[3] The government resisted and the parties filed Sentencing Memoranda with the Court.

The sentencing hearing was conducted on August 29, 2003, by Chief Judge Ronald E. Longstaff. Defense counsel offered testimony from Nicholas Tormey, a licensed sex therapist, primarily in support of the downward departure sought under § 5K2.13, and in support of the argument that incarceration would disrupt his sex therapy treatment. (Sent. Tr., pp. 8-54). The government offered testimony from Dr. Amy Hamilton, a psychologist at the Federal Medical Center in Rochester, Minnesota, who addressed the other grounds raised for downward departure. (Sent. Tr., pp. 54-66).

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[3] In support of his reduced mental capacity argument, Lighthall advanced five mental health diagnoses that were a blend of mental health disorders including: (1) obsessive-compulsive disorder; (2) unspecified paraphilias; (3) depression; (4) attention deficit disorder; and, (5) the manifestation of "various personality disorder features such as avoidant and narcissistic and schizotypal characteristics." (PSR, Tormey August 22, 2003 Att., p.3) The district court apparently found the defendant's proof unpersuasive as to the last four diagnoses.

STATEMENT OF THE FACTS

The underlying facts are detailed in the presentence report. (PSR, ¶¶ 8-21, pp. 5-9) At the time of his pre-PROTECT Act offense conduct, Lighthall was a college student at Iowa State University. Beginning in January 2002, he avidly collected and disseminated a wide variety of pornographic materials through his university-based Internet account, a significant portion of which constituted child pornography (*i.e.*, approximately 7,000 digital images depicting children engaging in sexually explicit conduct, and three gigabytes of pornographic movies portraying children engaging in sexually explicit conduct). On March 25, 2003, university officials discovered Lighthall's illicit use of his Internet account, and university police officers executed a search warrant at his dormitory room later that same day.[4] They seized his personal

[4] By his own admissions, Lighthall's interest in prurient materials began long before he started college at Iowa State University. While still in high school, he was online looking at adult-oriented pornography. His prurient interests progressed to the stage of receiving and distributing child pornography. He employed a distribution system on the Internet whereby he would barter items from his collection of child pornography with other collectors. Before Lighthall started college at ISU, he was able to operate an "F-Server" computer system through which his bartering occurred at rapid speeds of transmission. The university began to limit the size of its Bandwidth made available to its users. Lighthall could no longer generate and maintain the high load of traffic to his website, so he had to find a host outside the university. He found such a host server operating in Florida. The webmaster discovered that images of child pornography were being transmitted through his host site, and determined that the transmissions were through the computer servers at Iowa State University. He reported this to university authorities who determined that the IP

computer, the portable storage media in his possession, and computer related materials.

Lighthall seemingly cooperated with the officers. He provided them with some or all of his online user names, passwords, and email programs which he had used to trade child pornography. He aided them in retrieving child pornography from his computer. Lighthall admitted he knew the various visual depictions that he had been caught distributing from his dormitory room were of minors engaging in sexually explicit conduct. He further admitted having "phone sex" with persons he believed were under the age of 18, but denied that he had ever had sexual contact with a minor.[5] Lighthall was not arrested on March 25, but left the university dormitory and moved into his parents' home. Once in their shelter, he quickly resumed his Internet trading and collecting of child pornography. Lighthall rejoined several Internet "communities" devoted to the posting and trading of pornography, including child pornography. He

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address in question was assigned to a dormitory room occupied by Lighthall.

[5] Lighthall lied. He eventually admitted that he had met with and had had sexual contact with a 14-year-old girl whom he had sought out and communicated with through the Internet. (Sent. Tr., pp. 14, 20-21, 37).

even became an assistant manager of one of the "communities," thereby controlling access to its website.

In late April 2002, university police officers accessed the defendant's Internet account and discovered that he was again communicating with persons with whom he had previously traded child pornography. It was only after this discovery that the State of Iowa applied for a search warrant and a warrant for Lighthall's arrest.

A search of Lighthall's bedroom in his parents' home resulted in the seizure of several computer zip disks containing child pornography he had been collecting between April 8, 2002, and May 2, 2002. In an apparent effort to conceal his resumed trading activities, Lighthall had "deleted" the pornographic images from the hard disk drive of his parents' computer, and stored them on zip disks. The zip disks were found hidden in the closet of his bedroom.

At the sentencing hearing, Dr. Tormey testified his treatment of Lighthall began about a month following the indictment, and continued for the year that preceded his sentencing.[6] Dr. Tormey attested to the "remarkable progress" his client had made during therapy. (Sent. Tr., pp. 10-11). He further opined that Lighthall was a socially inept and isolated person, who found fulfillment through his mastery of the Internet as

[6] The sentencing hearing had been continued several times to accommodate the completion of the presentence investigation and report.

displayed by his special competence in collecting difficult-to-find materials. (Sent. Tr., pp. 16-17, 23). Tormey testified his client had a "real compulsion" to resume his trading of child pornography "because it had been so ingrained in him." (Sent. Tr., pp. 18-19). He explained that Lighthall's "way of managing his life is to get on the computer," as it "distracts him from his lack of

success in other areas" and "from his significant anxiety in dealing with . . . peers." (Sent. Tr., p. 19). Finally, he noted that Lighthall had an expansive "love map," which emotionally attracted his client to a very diverse range of erotica available on the Internet. (Sent. Tr., pp. 21, 26).

From all of this, Dr. Tormey concluded that this client suffers from "a significant mental illness," involving both low level depression and an "obsessive-compulsive disorder that's reflected in the perfectionist way that he went about collecting all of [his] erotica." (Sent. Tr., pp. 22-23, 54).

On cross-examination, Dr. Tormey conceded that his diagnoses were based exclusively on Lighthall's self-reporting, his own subjective observations of his client, and his diagnoses were not corroborated by any empirical testing or experiments, or by any regular polygraph testings. (Sent. Tr., pp. 32-35, 39-42,).[7]

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[7] In addition to the testimony of Dr. Tormey, Lighthall attempted to bolster his mental capacity argument on a single prior examination of him by Dr. Craig

SUMMARY OF THE ARGUMENT

The standard of review whether a downward departure is justified given the particular facts of a case is *de novo*.

Under this standard of review, the district court erred in this case in deciding to depart on the basis of U.S.S.G. §5K2.13 which is now a prohibited factor. Had Lighthall committed these crimes after April 30, 2003, or had his offense conduct continued past that date, the district court would have been precluded from even considering a departure. Although not precluded under the circumstances, the district court chose to ignore the public policy espoused in the amendments under the PROTECT Act. Ultimately, the record does not factually support a finding that Lighthall suffered from a significantly reduced mental capacity.

ARGUMENT

Rypma, a clinical psychologist. According to the presentence report (PSR, ¶¶ 15-16), Dr. Rypma opined that Lighthall "harbor[ed] intense feelings of inferiority and insecurity"; that he was socially inept and a loner; that he had a "schizoid" lifestyle; and that he was sexually unadjusted, finding sexuality to be "distressing, frustrating, and unsatisfying." Dr. Rypma additionally noted that "testing raised the possibility of a depressive disorder with psychotic features." In sum, Dr. Rypma concluded that a combination of Lighthall's "naivete, immaturity concerning issues of sexuality, poor self-esteem, and poor social skills . . . contributed greatly to the defendant's 'retreat into the world of his computer as a somewhat desperate effort to understand his emerging sexuality.'" Tormey's opinion was nothing more than a mirror image of Rypma's equally unsupported opinion.

I. The standard of review of a decision to depart from a sentencing guideline range is *de novo*.

On April 30, 2003, the President signed into law the PROSECUTORIAL REMEDIES AND OTHER TOOLS TO END THE EXPLOITATION OF CHILDREN TODAY Act of 2003 (PROTECT Act), Pub. L. 108-21, 117 Stat. 650 (April 30, 2003). Under Section 401(d)(2) of the Act the standard of review of the threshold decision to depart is *de novo*. *See United States v. Hutman*, 379 F.3d 773, 775 (8th Cir. 2003).

II. The district court erred in granting a downward departure on the basis of significantly reduced mental capacity.

Lighthall obtained a departure based upon a claim of significantly reduced mental capacity under U.S.S.G. § 5K2.13. This departure factor is limited, and it is no longer recognized as an available ground for departure in sexual abuse and exploitation cases.

Few, if any, question that deviants who sexually exploit children have mental health issues. But their mental health issues do not *ipso facto* mean they are entitled to a downward departure because of a significantly reduced mental capacity. *United States v. Motto*, 70 F. Supp. 2d 570, 574-78 (E.D. Pa. 1999); *United States v. McBroom*, 124 F.3d 533 (3rd Cir. 1997). This is reflected in the decision by the Congress to eliminate departures for such crimes committed on or after April 30, 2003, or commenced before then and continuing thereafter.

The defendant carried the burden of proof on this issue. The government submits that the district court erred in finding that Lighthall had shown, *first*, that his "mental capacity" was "reduced;" *second*, that his mental capacity, even if reduced, was reduced "significantly;" nor, *third*, that this unproved "significantly reduced mental capacity" contributed to the commission of his offense. Lighthall knew and understood exactly what he was doing. He has never suffered from a cognitive impairment, nor was there proof of any volitional dysfunction on his part. *United States v. Lake*, 53 F. Supp. 2d 771, 784-86 (D.N.J. 1999).

Jason Neal Lighthall has not been a mere passive collector of child pornography. He has been proven to be an aggressive distributor of such materials. He has been shown to be an active predator who has had sexual contact with a 14-year-old girl during an Internet-arranged encounter. His predatory conduct should have militated in favor of the full measure of punishment that the Sentencing Guidelines would permit. He should have been disqualified from any consideration under the "significantly reduced mental capacity" guideline. *See*, U.S.S.G. § 5K2.13 (2002 ed.) ("the court may not depart below the indicated guideline range if . . . (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public").

Had Lighthall committed his offenses after the PROTECT Act became effective, the district court would have been prohibited from departing on this ground. The district court refused to apply this obvious shift in public policy. This Court has repeatedly recognized that district courts may and, the government submits, should

take into account the policy considerations underlying guidelines amendments in deciding whether a departure is appropriate. *See United States v. Saffeels*, 39 F.3d 833, 838 (8th Cir. 1994) ("subsequent guidelines can be useful touchstones in making the determination of reasonableness called for in departure cases"), *citing United States v. Willey*, 985

F.2d 1342, 1349-1350 (7th Cir. 1993). The district court erred in not taking account of these public policy considerations.

Although the district court found that Lighthall suffered from a significantly reduced mental capacity, the record does not substantiate that conclusion. Dr. Tormey's diagnosis was based on his client's own descriptions and was not verified by any independent, empirical testing. More fundamentally, Tormey did not testify and the district court did not find that Lighthall's motivation to collect massive amounts of child pornography was beyond the heartland of cases involving convicted child pornographers. *See United States v. Caro*, 309 F.3d 1348, 1352-1353 (11th Cir.

2002); *United States v. Miller*, 146 F.3d 1281, 1286 (11th Cir. 1998). To the contrary, the urge to collect child pornography is the very essence of their offenses. *United States v. Silleg*, 311 F.3d 557, 562-564 (2nd Cir. 2002); *United States v. McBroom*, 124 F.3d 533 (3rd Cir. 1997).

Lighthall's compulsion, if in fact he has one, is his compulsive use of computers to achieve a sense of personal adequacy, not a compulsion to acquire child pornography *per se*. Moreover, Lighthall supposedly has an expansive "love map," attracting him to all forms of erotica, with a collection of adult pornography equaling his collection of child pornography. Presumably, he could have satisfied his urges by collecting personally-attractive materials that did not include depictions of children in sexually-provocative poses.

According to Dr. Tormey, this compulsion was evidenced by his client's meticulous *collecting* of child pornography. Whatever implications that might have in connection of the conviction of receiving child pornography, it does not explain why Lighthall needed to distribute pornographic images of children to strangers he encountered along the information highway. *See Caro*, 309 F.3d at 1353 (distinguishing between receipt and distribution charges).

The fact that Lighthall quickly resumed his collecting and trading of child pornography fairly soon after he was caught does not *ipso facto* establish that he was

unable to control his behavior and, if anything, this aggravated his criminal conduct. The record shows that he significantly altered his mode of operations in an effort to avoid further detection, by deleting child pornography from the hard disk drive and storing it instead on zip disks. Lighthall clearly could alter his activities when it suited his own purposes. He simply chose not to discontinue his child pornography-related activities. His conduct in this regard speaks more of calculation than irresistible compulsion.

CONCLUSION

The United States respectfully requests that the sentencing decision of the United States District Court for the Southern District of Iowa be reversed, and that this case be remanded for resentencing with instructions to impose an appropriate sentence within the original sentencing range.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the page limitation of Fed. R. App. P. 32(a)(7)(A). This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) as it contains 3,353 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 9.0 in Times New Roman font, 14 point.

Dated: October 31, 2003.

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CERTIFICATE OF SERVICE AND VIRUS SCAN

I hereby certify that I did on this 31st day of October, 2003, mail two true and correct copies of the foregoing BRIEF OF APPELLANT by placing it in the U.S. mail, postage prepaid and addressed to the following:

Paul D. Scott
8554 Alice Avenue
Clive, Iowa 50325

I further certify that two diskettes labeled United States v. Jason Neal Lighthall, Case No. 03-3426, were scanned for viruses by using the Inoculan for Windows NT scan software program, which reported no viruses were found on either diskette. One of these diskettes is being sent to the United States Court of Appeals for the Eighth Circuit, and the other is being sent to the counsel listed above.

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